

Taylor, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L.Ed.2d 110 (1986).

A key finding of the First Circuit's Court's decision was that the Puerto Rico certificate of need law discriminated against out-of-state pharmacies because pharmacies existing prior to 1999 did not have to obtain a certificate of need and most existing pharmacies were locally owned or controlled. *Walgreen*, 405 F.3d at 58. AHPA questions the validity of this factor in the First Circuit's analysis of the Puerto Rico certificate of need law.

Certificate of need laws, by their nature, regulate the addition of health facilities, services and equipment to the market. See Patrick John McGinley, *Beyond Health Care Reform: Reconsidering Certificate of Need Laws in a Managed Competition System*, 23 Fla. St. U. L. Rev. 141, 144 (1995). They are not aimed at regulating the market as it exists at the time of enactment. Thus, grandfathering existing services is an inherent part of a certificate of need program. An examination of the certificate of need requirements of the National Health Planning and Resources Development Act reinforces this position. That law created two regulatory schemes—certificate of need programs for new projects and appropriateness review for existing facilities and equipment. See Pub. L. No. 93-641, 88 Stat. 2225, Sections 1523(a)(4) and (a)(5) of the Public Health Service Act (repealed 1986).

With no evidence of discriminatory intent, evaluating the market as it existed prior to enactment of the certificate of need program does not provide insight with respect to the impact of the law. In fact, it reflects the result of the unregulated market. Thus, the fact that local interests may have dominated the pre-existing market should not be relevant to this analysis.

The First Circuit Court also noted that the Puerto Rico law is protectionist both *de jure* and *de facto* because it directs the

Secretary to reject a new pharmacy's request if the proposed location is already saturated with existing pharmacies. *Walgreen*, 405 F.3d at 56. This is precisely the intent of certificate of need laws, which is to avoid unnecessary duplication of health services in order to keep costs low.

The First Circuit applied the legal principle that, if a law has the effect of discriminating against interstate commerce, the state must justify the law in terms of the local benefit flowing from the law and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake. *Walgreen*, 405 F.3d at 59. The First Circuit erred, however, in applying the principle. AHPA believes that there are compelling policy reasons to support certificate of need programs, even if there is a disproportionate impact on interstate interests.

Moreover, in light of the fact that the Puerto Rico law treats all pharmacies applying for certificates of need alike, AHPA would urge application of the tests set forth by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In that case, the Court held that "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

As previously noted, health planning and certificate of need regulation are critically important tools available to states to promote and ensure that there is a reasonable geographic distribution of health care services and resources, including health services and resources needed in medically underserved areas. Recognizing the value of these tools, a majority of states established certificate of need programs well before there was a congressional mandate to do so, and thirty-six states, the District of Columbia, Puerto Rico, and the U. S. Virgin Islands continue to rely on them. Certificate

of need programs, in conjunction with state and community health plans, can be used, and often are used, proactively to improve both geographic and economic access to care.

CONCLUSION

This court should grant the petition for certiorari and reverse the First Circuit's decision.

Respectfully submitted,

MARK S. JOFFE *
KELLI D. BACK
LAW OFFICES OF MARK S. JOFFE
1800 K Street, N.W.
Suite 720
Washington, D.C. 20006
(202) 457-6633

* Counsel of Record

December 8, 2005